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IN THE

Supreme Court of the United States

October Term, 1987

CORRECTED COPY

WILLIAM C. MILES, JR., III,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

I. Where a District Judge has made a factual finding of racial discrimination in employment, can the Court of Appeals reverse this finding as "clearly erroneous" where the District Court believes that the decision makers were prejudiced against the employee in making their employment decision and there are numerous facts upon which he relies in making this decision?

II. Should the rule of *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) authorizing a reversal where "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" be construed so as to prohibit the weighing of the evidence by appellate courts?

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No._____

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WILLIAM C. MILES, JR., III,
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vs.

GENERAL MOTORS CORPORATION,
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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The petitioner William C. Miles, Jr., III respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the Court of Appeals appears in the appendix. It is not reported and that fact is reflected in 843 F.2d 1391. The opinion of the District Court for the Northern District of Ohio is unreported and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on March 31, 1988, and this petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 52(a) Federal Rules of Civil Procedure:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

United States Code, Title 42; Section 2000e-2(a)(1):

> It shall be unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or . . .

STATEMENT OF THE CASE

After having exhausted his administrative remedies, petitioner brought suit against respondent General Motors Corporation pursuant to 28 U.S.C. 2000e-5(f)3 for a violation of 28 U.S.C. 2000e-2(a)(1).

Petitioner, a black male, just shy of a bachelor's degree in college, obtained a position with respondent through a minority recruiter, Ludot (T.12). After a training program, which included a period of work in the foundry, petitioner became a foundry supervisor for respondent at its Central Foundry facility at Defiance, Ohio.

Although he began working as a foreman on December 3, 1973 petitioner was reduced to the hourly ranks once due to layoffs. But he served primarily as a foreman until he was demoted to the hourly ranks in June of 1977. This demotion formed the basis of this suit.

When petitioner was foreman there was only one other black foreman in a work force of 5000. There was only one black above supervision, a certain Terry Lee from "the office" (T.97).

The Company claimed that petitioner failed to require his workers to comply with safety and quality/production rules; that he had excessive down time and performed "work" of hourly employees in violation of the collective bargaining agreement. But the procedures which the respondent described as "auditing" his operations to assist him to improve were in fact very disruptive to the efficient functioning of his production line and actually, in his case, were a form of racial harassment (T.4-5). As petitioner testified:

A. Tom McLenon would come around in my area during work and he would stand there. Quite naturally my employees is going to look at him. So when the line employees noticed him he was jumping me because they were looking up from the job, which is the normal reaction.

Q. Did you notice whether he was doing that to the white foremen.

A. He noticed my people pouring iron; it was only me getting the criticism. He noticed the other shifts, too, but I got the criticism.

Q. And the foremen on the other shifts were white?

A. Yes.

Later, he noted that there was a quality audit. Supervision was supposed to come by once a day. For petitioner they did it two to three times a day "to make sure they got it" (T.25).

Q. After auditing you three times maybe one (of) them would be a bad audit?

A. Yes.

Q. Did they do that on the other shifts?

A. I was the only one receiving that kind of treatment (T.25).

Earl Jones, who had poured iron for five years, had earlier testified that petitioner compared favorably with other foremen for whom he had worked (T.6-7). Further, he was not aware that there were any greater number of line breakdowns under petitioner than under other foremen (T.7).

Petitioner also contended that supervision undermined his discipline over his workers while at the same time criticized him for inadequate discipline.

Q. Did you ever discipline any men under you for not wearing goggles?

A. Yes.

Q. What would happen then?

A. I would send a person out for so many days and McLenon would pay him for the time he was out. What is the good of sending him out; it was nothing but a vacation.

Q. Did that happen on more than one occasion?

A. In just about every case. I can't remember one that I put out that didn't get paid.

There was testimony that petitioner's immediate supervisor, Thomas McLenon, told petitioner that he intended to make him quit (T.26).

> Why don't you quit? If you don't, eventually you will be put back.

On one occasion after another black foreman, John Harris, was demoted, McLenon said to petitioner "There is one more to go." (T.40). This was not denied by McLenon. On cross-examination, McLenon admitted telling petitioner on three or four occasions that he should quit being a foreman (T.102). This was purportedly done "to motivate him" (T.102).

Witness Jones had also testified that iron pouring was done in extremely hot conditions making people irritable and causing absentee problems (T.5). He noted that as the result of this petitioner sometimes "worked", meaning did some work that only hourly employees were supposed to do. However, he testified that all foremen do this on occasion (T.6). Every other witness, who testified on this point, including respondent's own supervision, concurred with this statement. Yet, one of the criticisms of petitioner was that he "worked".

Witness Files also testified that petitioner supervised in a difficult area (T.61) but that he ran the department as well as could be expected (T.61). He also said, when asked if McLenon treated petitioner any differently than he treated other foremen, that

> he put a lot of pressure on Miles, I would say this would be quite noticeable (T.63).

Petitioner testified that he was demoted shortly after he posted an invitation on the Company's bulletin board to a fish fry to which all employees were welcome.

> I believe this kind of rushed things on me; it happened the same week.

Petitioner, a large man who played college football, was also known as "Big Daddy" (Exhibit 1) (T.44).

The District Judge noted that in the conservative and lily-white environment of Defiance, "such activities were not viewed with pleasure by those in position of authority."

The petitioner testified that he broke all kinds of production records as foreman (T.29). Management tried to rebut this but their records were no longer available.

Although there was considerable testimony concerning safety laxity, petitioner testified that there were no lost time accidents under his supervision (T.32).

He also noted that he once ran 100% production on one line but a different person got credit in the house organ (T.29). When this was called to management's attention, petitioner was told that they "forgot" (T.30). He never got the recognition he deserved. When management testified on this, it was blamed on "inadvertence" (T.105).

Finally, despite efforts by management to show the contrary, petitioner indicated from personal knowledge that his replacement was white—one Isaac Sheldon (T.159). (The Court of Appeals disregarded this testimony, making its own finding that he was replaced by another black [Opinion p. A3]).

The District Judge ruled that the demotion to the hourly ranks was racially motivated and granted relief on January 13, 1985. On March 31, 1988 the Court of Appeals reversed, found the decision "clearly erroneous" and ordered final judgment to be entered for respondent.

REASONS FOR GRANTING THE WRIT

The decision below is one of two decisions within a two-week period wherein the Sixth Circuit found District Court decisions of racial discrimination "clearly erroneous . . .". In both cases, there was ample evidence to justify the District Judges' findings of racial discrimination.

In addition to the case at bar, decided March 31, 1988, the Sixth Circuit decided *Batts v. NLT Corp.* on April 12, 1988. That case can be found at 844 F.2d 331.

Petitioner is not unmindful of the reluctance of the Court to review cases having little significance to the public at large but primarily to the litigants. Perhaps the fact the two lower court decisions finding racial discrimination were reversed as clearly erroneous within a two-week period will prompt this Court to examine whether the Sixth Circuit is following precedent in this area.

The leading case in this area is *Pullman-Standard v. Swint,* 456 U.S. 273, 290 (1982):

> a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous under Rule 52(a).

Later, in *Anderson v. City of Bessemer City,* 470 U.S. 564, this Court ruled at page 573 that:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*"

Petitioner believes that in both the case at bar and in *Batts*, the Sixth Circuit substituted its judgment for that of District Court and that this trend justifies this Court's intervention. Since in most situations the Courts of Appeal are the courts of last resort, it is critical that these courts be reminded that they must resist the impulse of becoming the ultimate fact finder.

This is particularly critical in an area where a court infers intent. Intent being within the mind can be exposed in a variety of ways. One of these ways is in the manner of giving testimony. In addressing this, this Court stated in *Anderson, supra*, at page 580:

> In so holding, we do not assert that our knowledge of what happened 10 years ago in Bessemer City is superior to that of the Court of Appeals; nor do we claim to have greater insight than the Court of Appeals into the state of mind of the men on the selection committee who rejected petitioner for the position of Recreation Director. Even the trial judge, who has heard the witnesses directly and who is more closely in touch than the appeals court with the milieu out of which the controversy before him arises, cannot always be confident that he "knows" what happened. Often, he can only determine whether the plaintiff has succeeded in presenting an account of the facts that is more likely to be true than not. Our task—and the task of appellate tribunals generally—is more limited still: we must determine whether the trial judge's conclusions are clearly erroneous.

In both *Batts* and the case at bar, there were some facts which the District Judge could consider in concluding that there was discriminatory intent. Furthermore, both District Judges saw and heard all the witnesses and were in the singular position of being able to weigh the sincerity of their views. As stated in *Anderson, supra*, at p. 575:

> for only the trial judge can be aware of the varieties in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

The opinions in the case at bar and in *Batts* resemble district court decisions weighing evidence, forming conclusions, accepting and rejecting arguments. They reveal a court more interested in the trial court's function than in the appellate function. The statement in *Batts* that "these incidents cannot possibly support a charge of intentional discrimination" (p. 334) is clear evidence of the appellate judges' substituting their judgment for that of the district judge. In *Batts* a Nashville judge heard Nashville witnesses and presumedly was well acquainted with the atmosphere in Nashville. In the case at bar the trial judge, from rural Huron County, Ohio, in Northwest Ohio, sitting in Toledo, in Northwest Ohio, and hearing witnesses from rural Defiance, Ohio, presumedly was well acquainted with the atmosphere in his own area.

The appellate court challenged the district judge's finding that Defiance was a "lily white environment." Counsel did not request the district judge to make this finding and, accordingly, did not employ Fed. R. Evid. 201(e) relating to notice. Rule 201(c) permits the trial judge to take judicial notice "whether requested or not". Whether or not this remark falls into the category of "judicial notice", the district judge was evincing his own knowledge of his own district. This is one of the reasons why deference is given to the findings of fact by federal trial judges. Perhaps this is the kind of "expertise" alluded to by the Court in *Anderson, supra*, at p. 574.

In the case at bar the trial judge believed that petitioner's demotion to the ranks was racially motivated. It is clear from the district court's opinion

that the judge believed petitioner had satisfied the test to prove a *prima facie* case of discrimination as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As applied to the case at bar the petitioner was qualified, black, was demoted, and was replaced by a white. The burden would then shift to respondent to establish non-discriminatory reasons for its actions. It is clear that the trial judge believed the reasons stated by the respondent were, indeed, pretextual. But the appellate court felt they were not. This is an example of how the appellate court substituted its judgment for that of the petitioner.

Furthermore, there was direct evidence of discrimination. In particular there is the undenied statement by the supervisor that there was one more to go, meaning petitioner, after another black foreman suffered a nervous breakdown.

The supervisor to whom these remarks were attributed was alleged to have harassed and undermined petitioner. Petitioner asked to be transferred to another department but was refused.

Once, when the foundry had an exceptionally productive period, respondent issued a bulletin congratulating its supervisors by name. Petitioner's name was omitted and when he complained, nothing was done to correct this.

There was ample evidence upon which a trier of fact could base a finding of discrimination. Likewise, another finder of fact might have come to a different conclusion. A reading of the appellate decision reflects that the panel was unconvinced that there was discrimination. But this is not its function. As reflected in *Wainwright v. Sykes*,

433 U.S. 72, 90 (1977) the trial on the merits was the main event, rather than a tryout on the road. And as stated in *Anderson, supra,* at p. 575:

> the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much.

Likewise, in *Batts,* the court of appeals reversed a carefully thought out 93-page memorandum and order of the district court, after a twelve (12) day trial. In *Batts* the district judge found for some plaintiffs and against others. Yet the court of appeals found error for the trial court to find a discriminatory animus from the facts. Instead it attributed the actions to the "normal frictions that occur in any employment relationship" Counsel does not represent the losing plaintiffs in *Batts* and there is no appeal pending from that case. Yet these two decisions, handed down back-to-back within two weeks of each other, cause concern to practitioners in the Sixth Circuit who handle these kinds of cases.

In both cases, the appeals court relies upon this court's language in *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948) relating to a reversal where "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". This language has been translated in these two cases into a license to weigh evidence rather than to apply the classic language of Rule 52(a)—the clearly erroneous test.

This language is subjective in nature and is being used by the appellate court to substitute its judgment for that of the trial court. To the extent that this is being done, the rule should be construed so as to prohibit such weighing of evidence by appellate courts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Date: June, 1988

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed March 31, 1988)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

Case No. 85-3856

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM C. MILES, JR., III,
Plaintiff-Appellee,

vs.

GENERAL MOTORS CORPORATION,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NORTHERN DISTRICT OF OHIO

Before: MILBURN and BOGGS, *Circuit Judges,* and HARVEY,* *Senior District Judge.*

Per Curiam. William C. Miles, Jr., III, is a black man who was employed by the General Motors Corporation (GM) at its Defiance, Ohio, foundry beginning in March 1973. For much of his employment there he worked as a

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* The Honorable James Harvey, United States District Senior Judge for the Eastern District of Michigan, sitting by designation.

foreman, although he also worked as a production worker, or was laid off entirely. In June 1977, after serving as a foreman for the preceding twenty-one months, Miles was demoted to hourly production worker. Miles sued GM under VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, contending that this demotion was based on his race. GM contends that the demotion was entirely proper, based on his working record, and that Miles was in no way treated differently because of his race.

After a one-day bench trial in September 1980, the case was taken under advisement. In January 1985, the district court found in favor of Miles, resting its opinion on a number of specific factual findings as to practices at the Defiance foundry and events involving Miles. In the district court's view, these findings discounted GM's stated reasons for demoting Miles.

Upon careful consideration of the record, we find a number of important instances where the district court's findings are directly contradicted by the record, unsupported by the record, or otherwise clearly erroneous. In the absence of these erroneous findings, plaintiff has not sustained his burden of showing that the defendant's reasons for the demotion are pretextual and that he suffered from disparate treatment on account of his race, in violation of Title VII. We therefore reverse the judgment of the district court.

I

Miles was first hired at the Defiance foundry in March 1973. After four months of training in a pre-management program, he served as foreman from December 1973 until February 1974, when he was laid off for five months because of business conditions. In July 1974, he was recalled as a foreman and worked in

that position for six months. From January to September 1975, he worked as an hourly production worker because of a reduction in work force. In September 1975, Miles was again made a foreman and worked in that position until his demotion in June 1977.

During that time Miles's work performance, as reflected by contemporaneous job evaluations from two supervisors, was consistently marginal. On three performance evaluations from 1975 to 1977, out of forty-nine rating areas, forty-one were below average. Direct testimony from supervisors and from company records indicated: (1) that the shift which Miles supervised had twice as much "down time" as a comparable shift which he did not supervise; (2) that he received twenty-six grievances from employees during a period when a comparable supervisor received three grievances; and (3) that during his period of employment as supervisor from 1975 to 1977 his shift had sixty-two injuries compared to twenty injuries on the comparable shift. Further, supervisors repeatedly observed substantial violations of safety and work practices on Miles's shift beyond those which occurred on other shifts.

The record shows, and the judge made no finding or indication to the contrary, that Miles was replaced by a Mr. Jordan, a black man.

None of the above matters was contradicted, or found not credible by any of the district court's findings.

Rather, the district court discounted this evidence based on a series of findings disparaging the general management and atmosphere of the plant, and the specific actions of Miles's final supervisor, Thomas McClennan. This included such determinations as:

1. That the Defiance plant was a "lily-white environment";

2. That plaintiff "drove sporty cars" and "played hard," which was "not viewed with pleasure by those in positions of authority;"

3. That defendant's arguments based on Miles's work performance were unsupportable because "such things should be shown by [work] records, and no such records were provided," so that it must be taken that "the records would ... refute the claims of the defendant;"

4. That the shift preceding Miles's "usually did not clean up the pouring line and the ladles before they left," adding to the difficulties of Miles's shift;

5. That a fellow foreman, Mr. Files, the "only ... witness who can be considered as being disinterested," had been treated differently than Miles and that Files thought Miles "did exceptionally well at [his work]";

6. That McClennan, plaintiff's last supervisor, had made derogatory remarks after the resignation of another black foreman, "who was subjected to the same treatment as plaintiff."

However, upon our consideration of the record, each of these items is not supported by the record and is clearly erroneous.

II

There was no evidence that the Defiance foundry was a "lily-white environment." The evidence instead supports GM's contention that there not only were there many black employees, but a significant number of black foremen were employed. McClennan testified, without contradiction, that three of six foremen under his supervision were black. The judge made no specific findings to support his general assertion. Plaintiff

contends on appeal that his finding could have been supported based on judicial notice. However, judicial notice only applies to facts "not subject to reasonable dispute," Fed. R. Evid. 201(b), and only applies where the opposing party has notice that judicial notice is being taken. Fed R. Evid. 201(e).

There was absolutely no evidence indicating displeasure by the company at the fact that Miles drove a Cadillac, a GM product.

Further, the uncontradicted testimony in the record was that detailed production records are routinely destroyed after one year. No request was made by the plaintiff for the preservation or production of the records. Heretofore, the so-called "missing documents rule" cannot be applied against GM in this situation. Before the missing document rule will be applied the missing document must be within the power of the party to produce, and a demand for the document must have been made. 2 J. Wigmore, Evidence, §291, at 226 (1979). *See also Layne v. Vinzant*, 657 F.2d 468 (1st Cir. 1981). Therefore the district court erroneously used this rule to determine conclusively the issue of Miles's work performance.

A thorough search of the record has revealed only one piece of evidence in the entire record regarding any exacerbation of Miles's difficulties by sloppiness of the first shift. In response to a different question, Miles added that there was a time when "my equipment was in a big mess and it had to be cleaned up in order to pour good iron and there was down time, which should have been charged to the first shift." There was no elaboration, or any intimation that it ever happened again. There is simply no support in the record for the district court's finding that the first shift "usually did not clean up."

It is particularly strange that the district court makes no reference to the fact that Mr. Files, its exemplar of a disinterested witness and of a foreman who was treated properly and in a fashion disparate from that of Miles, is black. Thus, the distinction between Miles and Files was not that one was black and one was white, but that one was doing an acceptable job and the other was not.

III

The district court correctly set out the analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in which a plaintiff must first produce a prima facie case of discrimination, after which the employer bears the burden of producing a legitimate non-discriminatory reason for its action, after which defendant must establish that defendant's articulated reason is pretextual. *Id.* at 802-805. Accord, *Williams v. Hevi-Duty Electric Co.*, 819 F.2d 620, 629 (6th Cir. 1987); *Grubb v. W.A. Foote Memorial Hospital Inc.*, 791 F.2d 1486, 1492-93 (6th Cir. 1984). However, rather than conducting this analysis, the court noted that since it had "heard all the evidence, it would address the ultimate factual issue, rather than engaging in the foregoing three-tiered evidentiary analysis." The court thus did not directly examine the question of whether management's reasons were in fact pretext. The court appeared to rest on a general feeling that Miles had been treated shabbily, rather than on any evidence that would justify the conclusion that management's stated reasons were non-existent or pretextual. As set forth above, the court's specific statements on most of the important issues go well beyond the record.

The district court did not distinguish its findings of facts from conclusions of law. It specifically noted that it would "not make any minute analysis of the evidence

offered, but will resolve the dispute of fact by stating its ultimate factual conclusion." However, we have set out above the major factual statements the judge made in support of his conclusion that Miles's demotion had been based on racial discrimination. After our careful consideration of the record supporting the above findings, this court is confident that those findings do not meet the standard of *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948). The Supreme Court there stated that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* at 395.

Nor are the district court's findings insulated from review by its statement that its findings rested on "those little subtleties and variations in the manner and appearance of the witnesses on the stand, and the way in which they spoke and responded to questions . . ." As the Supreme Court recently emphasized in *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985),

> "[t]his is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors others than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. Where such factors are present, the court of appeals may find clear error even in a finding purportedly based on a credibility determination."

In this case the district court did not rely on believing Miles as opposed to other witnesses in direct contradictions, as, for example, whether a particular

remark was made to Miles. Miles's testimony conceded that he had made no specific complaints of discrimination, and he was unable to relate any specific incidents purporting to display racial animus, with the exception of one incident.

That incident related to Miles's hearsay narrative of a black foreman who apparently left because of mental difficulties ("there was one guy who was talking to an apple"). Miles stated that McClennan had said "there is one more to go," which Miles apparently understood to mean one more black foreman who should be disposed of. However, Miles did not hear the remark himself, gave no indication that anyone else had made the same interpretation of the remark, and gave no indication that he had conveyed his interpretation to anyone else. We note that it is uncontradicted that there were three black foremen who worked for McClennan at this time. There was no evidence whatsoever concerning the relations between the unnamed foreman and McClennan, so the court is clearly erroneous in finding that the foreman was treated the same as Miles, or, indeed, in any particular manner.

There is no credibility determination involved in the consideration of Miles's performance appraisals, which were uniformly below standards, or the grievance or injury reports. In particular, despite Miles's repeated assertions that he had a "perfect safety record," management could legitimately be concerned about a significantly higher injury rate as an indication of poor supervision. Management particularly testified to his failure to ensure that his workers wore their goggles as an example of failure to supervise those items that were most easily supervised. The court also misstates the record in finding that Mr. Files had testified that Miles

ran his unit "exceptionally well." The actual statement in the record is that Miles ran it "as well as could be expected," hardly a ringing endorsement.

In short, the district court's findings display a consistent overstating of the record to present items favorable to Miles, with no clear consideration of the key issue of whether the management concerns were in fact pretextual. Although GM's relation to Miles may not stand as a monument of enlightened employee relations, the record as a whole simply will not bear the interpretation that the district court placed on it.

It is possible for there to be racial animus against one worker even though none is displayed against other comparably situated workers of that worker's group. However, the claim that its actions were based on a competency determination, and were not a pretext for discrimination, is certainly buttressed by the fact that Mr. Files, the court's star witness, and Mr. Jordan, who at the time of trial had held Mr. Miles's job for several years, are both black.

In this case there is some evidence, which the court could have credited, that McClennan did not particularly like Miles and that management was not always responsive to Miles's concerns. The court found it significant that Miles's name had been left off a recognition list when the plant had good production. Despite a protest, no correction was published. However, after examining all of the evidence, including Miles's ratings over a period of time including ratings not by McClennan, the consistent pattern of the problems with his performance, the documentation of greater injuries and grievances on his shift, and the clear evidence of appropriate recognition of other black foremen such as

Files and Jordan, we are left with the definite and firm conviction that the court erred in finding that racial discrimination was responsible for Miles's demotion.

In the absence of the factual findings which have been found above to be clearly erroneous, there is insufficient evidence to sustain plaintiff's burden of showing that his demotion was not based on performance but rather was a pretext for racial discrimination. Therefore, judgment of the district court is REVERSED and REMANDED with instructions to dismiss the complaint.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed January 18, 1985)

Case No. C 78-116

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIAM C. MILES, JR., III,
Plaintiff,

vs.

GENERAL MOTORS CORPORATION,
Defendant.

OPINION AND ORDER

YOUNG, *J:*

This is an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, alleging racial discrimination in employment. The plaintiff took the necessary steps to bring the matter before the Equal Employment Opportunities Commission, which issued a "right to sue" letter, after which a complaint was filed in this Court. The defendant answered in the form of a general denial. This Court has jurisdiction pursuant to 42 U.S.C. §2000e-5(f).

The case was tried to the Court sitting without a jury, and was submitted to the Court upon oral argument. The trial commenced on September 24, 1980, and concluded on the same day. This Opinion will serve as the Court's findings of fact and conclusions of law. Fed.R.Civ.P. 52(a).

The major factual matters are not disputed, but the conclusions to be drawn from them are very much in dispute. Basically, the case falls into the so-called "disparate treatment" category. While this allegation has been described as "the most easily understood type of discrimination [because] [t]he employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin," *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977), the plaintiff also has the burden of establishing intentional discrimination by the defendant. *See, e.g., United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 715 (1983), *quoting Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981); *Teamsters,* 431 U.S. at 335 n.15; *Field v. Bolger,* 723 F.2d 1216, 1219 (6th Cir. 1984).

In order to prevail on his claim, plaintiff first must establish a *prima facie* case of discrimination. The Court may then infer that the discrimination was intentional. *Burdine,* 450 U.S. at 254, *quoting Furnco Constr. Co. v. Waters,* 438 U.S. 567, 577 (1978) ("the *prima facie* case 'raises an inference of discrimination only because we presume these acts if otherwise unexplained, are more likely than not based on the consideration of impermissible factors' "). Once the *prima facie* case is established, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the alleged disparate treatment. *Burdine,* 450 U.S. at 253; *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973); *Fields,* 723 F.2d at 1219. If the defendant meets this burden of production, the plaintiff then must be given the opportunity to establish that defendant's articulated reason is pretextual. *Burdine,* 450 U.S. at 253-56; *Green,* 411 U.S. at 804; *Fields,* 723 F.2d at 1219.

Since the Court has heard all the evidence, it will now address the ultimate factual issue, rather than engaging in the foregoing three-tiered evidentiary analysis. *See Aikens,* 460 U.S. at 715; *Fields,* 723 F.2d at 1219; *Talley v. United States Postal Service,* 720 F.2d 505 (8th Cir. 1983), *cert. denied,* 104 S.Ct. 2155 (1984); *Jones v. International Paper Co.,* 720 F.2d 496 (8th Cir. 1983). Additionally, in setting forth its findings of fact, the Court will not make any minute analysis of the evidence offered, but will resolve the dispute of fact by stating its ultimate factual conclusions.

The plaintiff at the time of trial was an unmarried black male of the age of thirty-two years. He had completed most of the course work for the college degree of Bachelor of Arts, with a major in Physical Education and Recreation. He had attended college on a football scholarship.

The defendant operates a large foundry at Defiance, Ohio, which at the times involved, employed approximately five thousand people.

After leaving college in 1972, plaintiff worked for a short time for a loan company, and then went to an employment agency, which soon referred him to the defendant. He was immediately engaged by the defendant.

On March 15, 1973, plaintiff began working for defendant at the Defiance Foundry as an hourly worker. On August 6, 1973, he was entered into a pre-management training program. In the course of this program he worked in several departments at various locations. On December 3, 1973, he became a foreman at Defiance. In February, 1974, because of economic conditions, plaintiff was reduced to an hourly worker, and remained in that status, with some lay-offs, until

September 13, 1975. He then returned to his position as foreman, which he retained until June, 1977, when he was discharged as a foreman and returned to the position of an hourly worker, in which he continued until the time of trial.

The defendant contends that plaintiff never performed adequately as a foreman, and built a file documenting the deficiencies in his performance, and defendant's efforts to get him to improve. Basically, the defendant's evidence charges the plaintiff with inability to require the workers under him to comply with rules designed to prevent injuries and insure efficient and quality production. Plaintiff is also accused of having excessive amounts of down time in his production line, and of doing the work of hourly employees very frequently, in violation of the union contract.

The plaintiff points out that in spite of its large numbers of employees, the defendant has almost no blacks in supervisory positions in its Defiance Foundry; that the procedures which the defendant describes as "auditing" his operations to assist him to improve them were in fact very disruptive to the efficient functioning of his production line and actually, in his case, were a form of racial harassment; that white foremen were not subject to such treatment; that his immediate supervisor, Thomas McLennon, told him he intended to make him quit; and that when another black foreman, who was subjected to the same treatment as plaintiff, suffered a nervous breakdown and was forced to resign, McLennon said that was another one down, but there was still another to go, meaning the plaintiff. As to these last two matters, McLennon didn't deny the "still one to go" statement, and admitted that several times he told plaintiff he should quit as foreman, in order, he said, to "motivate" him to improve his performance.

As is always the case in employment discrimination cases, it is difficult in this case to weigh the testimony of the parties, who are highly interested, and unconsciously shade their testimony to make themselves appear in the best light. Usually there are few really disinterested witnesses who can throw light on the situation, and the circumstantial evidence is often ambiguous.

However, by taking all of these matters into consideration, and recalling those little subtleties and variations in the manner and appearance of the witnesses on the stand, and the way in which they spoke and responded to questioning, it is possible to reach conclusions.

The picture that the totality of the evidence in this case shows is that the plaintiff, during the times in question, was young and exuberant. He worked hard, and he played hard. He drove sporty cars, and he gave parties to which all of defendant's employees were invited. In such a conservative and lily-white environment as Defiance, such activities were not viewed with pleasure by those in positions of authority.

An iron foundry is a very hard and dangerous place to work. The defendant's Defiance plant cast engine blocks for automobiles. This requires pouring molten iron out of ladles which are so heavy they must be moved by cranes. The molten iron must be poured accurately into openings in the molds which are called "sprue cups." The quality of the casting is affected by the manner in which the metal is poured; including the height from which it is poured. It is extremely hot, often above one hundred degrees Fahrenheit in the foundry, and molten iron is dangerous if it is spilled, as well as being expensive if it is wasted, either by spillage or defective castings.

The plaintiff was foreman on the second shift, working under these hard conditions. All newly employed iron-pourers started on his shift, and he had to train them, a process requiring some three weeks time. In addition, he had to take over after the first shift, which usually did not clean up the pouring line and the ladles before they left, leaving those chores to the plaintiff and his crew. When the plaintiff did discipline his men, his actions were not always upheld by his superiors.

The result of this was that plaintiff's line sometimes had more down time, when it was not moving, than it should have had. These factors also required the plaintiff to take a hand at doing the work of hourly workers more frequently than some other foremen did. Although section 215 of the union contract forbade foremen from doing hourly workers' tasks, and grievances sometimes resulted from violations, the evidence leaves no doubt that it was something that very commonly happened. Every foreman did it, and was grieved of because of it.

While the work rules required iron pourers to keep their eyes fixed on the sprue cup at all times while pouring, in fact it is difficult to do so, and not entirely necessary.

Although the defendant contends that there were deficiencies in the quantity and quality of the production on the plaintiff's lines, such things should be shown by the defendant's records, and no such records were produced. Since the plaintiff testified that both in quality and in quantity, especially the latter, his lines' production was higher than others, the failure of the defendant to produce its records must be taken to show that if produced, the records would support the testimony of the plaintiff, and refute the claims of the defendant.

On the matter of production, one very significant point was shown in the evidence. On one particular occasion, the foundry had had an exceptionally productive period. The defendant issued a bulletin congratulating its supervisors by name. The plaintiff's name was not listed. Naturally, he was hurt by this, and complained to defendant's management. The top manager told plaintiff he was sorry that his name had been omitted, but he did nothing to correct the record. While the defendant's rules provided that a foreman who could not perform adequately in a particular department had the right, before demotion, to be transferred to other areas, the plaintiff's request for such a transfer was ignored. He was demoted without being given a chance in a different department.

There was only one witness who can be considered as being disinterested, William Files, Jr., a foreman in defendant's foundry for many years. Mr. Files was acquainted with plaintiff and his work, and testified that he did exceptionally well at it. He also knew that there were difficulties between plaintiff and Mr. McLennon. The latter put a lot of pressure on the plaintiff and treated the plaintiff differently than he did the witness Files.

Files also testified that while foremen were not supposed to do line employees' work, it sometimes is necessary on the spur of the moment to go in and do it. He had done so, and grievances had been filed against him because of it.

After considering the evidence as a whole, the Court is left with no doubt that the plaintiff's demotion was the result of intentional racial discrimination against him by defendant's employees, for which the defendant is responsible.

The remaining problems in the case concern the relief to be granted.

A successful Title VII plaintiff generally is entitled to reinstatement and an award of back pay. The statute, however, does not countenance the award of legal damages such as compensatory or punitive damages. *See Harrington v. Vandalia-Butler Bd. of Education*, 585 F.2d 192 (6th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979); *Adler v. John Carroll University*, 543 F.Supp. 652 (N.D. Ohio 1982); *Elis v. Logan*, 543 F.Supp. 586 (W.D. Ky. 1982).

With respect to reinstatement, it seems clear that once a finding of discrimination has been made, reinstatement should be granted as a matter of course. *See, e.g., George v. Farmers Elec. Coop, Inc.*, 715 F.2d 175, 178 (5th Cir. 1983) (after finding of discrimination, "reinstatement should be granted in all but unusual cases"). *See also Sorrells v. Veterans Admin.*, 576 F.Supp. 1254, 1265 (S.D. Ohio 1983) (court ordered reinstatement as an appropriate remedy under Title VII). The Court finds, therefore, that plaintiff is entitled to be reinstated to his former position as a foreman.

As to an award of back pay, the law in Title VII employment discrimination cases now is fairly settled in this circuit. A back pay award should put the discriminatee in the same position he would have been in but for the unlawful discrimination and, absent exceptional circumstances, always should be awarded if a Title VII violation is found. *Rasimus v. Michigan Dept. of Mental Health*, 714 F.2d 614 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 2151 (1984). A successful Title VII plaintiff is entitled to receive his salary, including raises, he would have received absent the discrimination. *Rasimus*, 714 F.2d at 626. Further, sick pay, vacation

pay, pension and other fringe benefits which would have been received by the plaintiff were it not for discrimination also should be included in the back pay award. *Id.* Income taxes and social security taxes which would have been deducted from the wages the plaintiff would have received absent discrimination should not serve to reduce any back pay award. *Id.* at 627.

While it is true that back pay awards are the rule, not the exception, once there has been a finding of discrimination, the twin purposes of Title VII should never be lost on the Court. In the words of the Supreme Court,

> [G]iven a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered for past discrimination.

Rasimus, 714 F.2d at 626 (*quoting Albemarle Paper Co. v. Moody,* 422 U.S. 405, 421 (1975)). *See also Ford Motor Co. v. EEOC,* 458 U.S. 219 (1982).

Further, Title VII claimants are required to mitigate their damages by the express language of §706(g), which provides in pertinent part that:

> [i]nterim earnings or amounts earnable with reasonable diligence by the person . . . discriminated against shall operate to reduce the back pay otherwise allowable.

42 U.S.C. §2000e-5(g). This duty to minimize damages is "rooted in an ancient principle of law," *Ford Motor Co.,* 458 U.S. at 231; *Rasimus,* 714 F.2d at 623, and operates to reduce proper back pay awards otherwise allowable. *Rasimus,* 714 F.2d at 623.

In light of the foregoing principles, the Court must examine the evidence presented to determine whether or not plaintiff suffered any loss of earnings as a result of his demotion from foreman to hourly worker. The loss of earnings in this cause encompass two different areas, actual wages and salary paid and fringe benefits.

As to the matter of fringe benefits, the only one to which any reference was made in the evidence is the right to purchase General Motors automobiles at a discount. However, no evidence was offered as to the plaintiff's automobile purchases or what the discount upon them would have amounted to in money. Hence no money damages may be awarded for loss of fringe benefits.

On the matter of wage and salary loss, defendant's exhibits U and Y show that plaintiff's earnings as a salaried worker for June 20, 1977 to June 6, 1980 were $61,984.73. Had he continued to work as a foreman on salary, his earnings would have been $60,784.25. Thus plaintiff suffered no loss of earnings during the period. Projecting the figures from June 6, 1980 to September 24, 1980, the date of trial, would not change this situation. The Court thus concludes that the plaintiff had shown no loss of earnings as the result of the discrimination practices by the defendant.

In Title VII cases, money damages are limited to the plaintiff's actual loss of earnings. *See Harrington*, 585 F.2d at 197. However, since the Court has ordered plaintiff's reinstatement, if the actual wages he earned for the entire period from June 7, 1977 to the date of his reinstatement are less than the salary he would have earned as a foreman over that period, he is entitled to judgment for the difference. The parties shall attempt to agree on the amount to be awarded, if any, and to

stipulate to the amount, employing the standards enunciated by the Sixth Circuit in *Rasimus*. The parties are to bear in mind that any doubts about the amount a successful plaintiff would have received had there been no discrimination should be resolved against the discriminators. *Rasimus,* 714 F.2d at 628.

As the prevailing party, the plaintiff is entitled to recover his attorney's fees and expenses in the case. The law is now clear as to the method of calculating attorney fees, and that counsel are expected to work this out without the necessity of hearing by the Court. The Court therefore will leave the matter of the amount of attorney's fees to be fixed by the parties. However, should counsel be unable to do so, they should inform the Court, and the matter of attorney's fees will be set for hearing.

Finally, counsel for the plaintiff shall, pursuant to Local Civil Rule 5.02, prepare and submit a draft of an order of judgment expressive of the Court's findings and conclusions in this Opinion and Order.

IT IS SO ORDERED.

DON J. YOUNG
Sr. United States District Judge

Toledo, Ohio

FINAL JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed September 13, 1985)

Case No. C 78-116

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIAM C. MILES, JR., III,
Plaintiff,

v.

GENERAL MOTORS CORP.,
Defendant.

FINAL JUDGMENT ENTRY

On January 18, 1985, this court issued its opinion and order finding for the plaintiff and against the defendant on the issue of liability, which finding is hereby confirmed.

The parties have agreed on calculations of damages with the defendant reserving its exceptions to the court's determination of liability. The parties have agreed that back pay through April 7, 1985 is in the amount of seventy-nine thousand thirty-eight dollars and 14/100 ($79,038.14).

The parties have agreed that there are no damages for health insurance.

The parties have agreed that the plaintiff is to receive life insurance benefits equal to twice his annual base, the same as all salaried employees.

The parties have agreed that the plaintiff has waived his claim for any damages for company contribution to the stock purchase plan.

The parties have agreed that interest on the back pay is in the amount of twenty-four thousand three hundred seventy-eight dollars and 25/100 ($24,378.25) through April 7, 1985.

The parties have agreed that the attorney fees and expenses are five thousand three hundred twenty-eight dollars and 30/100 ($5,328.30) together with sixty dollars ($60.00) in court costs.

The parties have agreed that an order of reinstatement shall issue together with an order that back pay will be added from April 7, 1985 through the date of reinstatement, which sum is to be calculated at a later date.

It is therefore, ORDERED, ADJUDGED AND DECREED, that plaintiff should be and he hereby is granted a judgment against the defendant in the sum of one hundred eight thousand eight hundred four dollars and 69/100 ($108,804.69).

It is FURTHER ORDERED that the plaintiff shall be reinstated to his former position of foreman and shall be awarded further back pay from April 7, 1985 through the date of reinstatement.

It is FURTHER ORDERED that the plaintiff is to receive life insurance benefits equal to twice his annual base, the same as all salaried employees.

To all of which the defendant specifically excepts.

/s/ DON J. YOUNG
Senior U.S. District Judge